No. 96-567

(4)

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1996

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

and

AMERICAN LUNG ASSOCIATION OF NORTHERN VIRGINIA, ET AL.,
Intervenors.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI BY INTERVENORS ENVIRONMENTAL DEFENSE FUND, INC., KATHLEEN F. DERRICOTT, CLIFTON E. DERRICOTT, ANDRE L. BROWN, CALEATA JOHNSON AND GWEN HEDGEPETH

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29 pp

QUESTION PRESENTED

Because of their particular interest in securing access to the courts to review decisions to issue permits under the Clean Air Act, Intervenors Environmental Defense Fund, Inc., Kathleen F. Derricott, Clifton E. Derricott, Andre L. Brown, Caleata Johnson, and Gwen Hedgepeth limit their Brief in Opposition to the first of the three questions presented in the Commonwealth of Virginia's Petition for Certiorari. These Intervenors suggest that the question is more appropriately framed as follows:

> Whether the Environmental Protection Agency lawfully refused to authorize the Commonwealth of Virginia's administration of the federal Clean Air Act permit program because Virginia would impose upon the program only narrow, restrictive opportunities for state court review of state agency permit decisions in direct contradiction to the Act's requirements of expansive citizen participation in and judicial review of, permit decisions.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 8

The Commonwealth of Virginia Has Provided No Basis Recognized By This Court, To Warrant Review Of The Decision Of The Fourth Circuit With Respect To The Judicial Review Provisions Of The Clean Air Act.

A. The Commonwealth Has Offered No Reasonable Alternative Interpretation Of The Judicial Review Requirements of §502(b)(6) Of The Clean Air Act That Merits Review By This Court 9

B. The Decision Of The Court Of Appeals Below Does Not Conflict With Applicable Decisions Of This Court. 17

Page

C. The Decision Of The Court Of Appeals Below Is Not In Conflict With Decisions Of Any Other Courts of Appeals 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases

Board of Medicine v. Virginia Physical Therapy Ass'n, 13 Va. App. 458, 413 S.E.2d 59 (1991) 5

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 15

Citizens for Clean Air v. Commonwealth of Virginia, 13 Va. App. 430, 412 S.E.2d 715 (1991) 4, 5

Commonwealth of Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996), petition for cert. filed (No. 96-567) 1, 5, 13, 16, 18

Environmental Defense Fund v. Virginia State Water Control Board, 12 Va. App. 456, 404 S.E.2d 728 (1991) 4, 5

Environmental Defense Fund v. State Water Control Board, Chan. No. HB-241-3 (City of Richmond, 1992) 5

Gregory v. Ashcroft, 501 U.S. 452 (1991) 17, 18, 19

Page

Harbor Cruises, Inc. v. State Corporation Comm'n, 219 Va. 675, 250 S.E.2d 347 (1979) 4

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981) 19

New York v. United States, 505 U.S. 144 (1992) 14

Residents Interested in Saving the Environment v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991) 7

Town of Fries v. State Water Control Board, 13 Va. App. 213, 409 S.E.2d 634 (1991) 4, 5

Warth v. Seldin, 422 U.S. 490 (1975) 14, 15

United States Constitution

Article III 2, 14

Page

Federal Statutes

33 U.S.C. § 1251 12

42 U.S.C. § 7661a(b) (CAA § 502(b)(6)) 2, 9, 10, 14, 16, 18

Code of Virginia

Va. Code § 10.1-1318(B) 4

Federal Regulations

40 C.F.R. § 70.4(b)(3)(x) 10

40 C.F.R. § 123.30 . . . . . 7, 13

60 Fed. Reg. 14588 12

61 Fed. Reg. 20974 12

Other Authorities

Chafee-Baucus Statement of Senate Managers, S. 1630, The Clean Air Act Amendments of 1990, reprinted in 136 Cong. Rec. 516, 941 (daily ed. October 27, 1990) 11

Page

Joint Legislative Audit and Review Commission of the Virginia General Assembly, Solid Waste Facility Management in Virginia: Impact on Minority Communities (1995) 7

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI BY INTERVENORS ENVIRONMENTAL DEFENSE FUND, INC.[1], KATHLEEN F. DERRICOTT, CLIFTON E. DERRICOTT, ANDRE L. BROWN, CALEATA JOHNSON, AND GWEN HEDGEPETH

STATEMENT OF THE CASE

The Commonwealth of Virginia ("Commonwealth") has filed a petition for certiorari asking this Court to review the decision of the Court of Appeals for the Fourth Circuit holding that the Environmental Protection Agency ("EPA") properly did not act arbitrarily, capriciously or unlawfully in refusing to delegate administration of the Clean Air Act air permit program. Commonwealth v. Browner, 80 F.3d 879 (4th Cir. 1996). This Brief in Opposition is submitted by Intervenors, Environmental Defense Fund, Inc. and Kathleen f. Derricott, Clifton E. Derricott, Andre L. Brown, Caleata Johnson and Gwen Hedgepeth ("EDF Intervenors"). Intervenors, a national nonprofit environmental organization with thousands of Virginia members, and five individual black citizens of Virginia, have all experienced first hand the harsh consequences of Virginia's barriers to state court review of environmental permitting, which serve to suppress citizen involvement and grant special privilege to permit applicants. Intervenors thus oppose the Commonwealth's efforts to subvert the express actions of Congress to expand and encourage citizen participation and afford expansive judicial

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[1] The Environmental Defense Fund, Inc., is a not-for-profit environmental membership organization. Pursuant to Supreme Court rule 29.6, there are no other parent companies or wholly owned companies.

review in the process of issuing air emission permits, by seeking to extend its own harsh barriers to judicial review to the administration of the federal Clean Air Act.

Because the primary interests of EDF Intervenors are in securing meaningful and appropriate citizen participation in, and judicial review of, Clean Air Act air permit decisions in Virginia, EDF Intervenors address only the first question presented in Virginia's petition for certiorari — that regarding the failure of Virginia to satisfy the judicial review requirements set forth in §502(b)(6) of the Act, 42 U.S.C. §7661a(b)(6). EDF Intervenors support the position of the EPA and the remaining Intervenors with regard to the second and third questions presented, but do not address those issues here.

The decision of the Fourth Circuit affirmed EPA's determination not to delegate Clean Air Act program administration to the Commonwealth, in part, because Virginia law does not allow for judicial review of decisions that would be made by state agencies in granting or denying air emission permits under the Act to the extent required if delegation is to be made. The Court of Appeals held that the Act required expansive public participation and judicial review, that the extraordinarily-restrictive limits on judicial review in the Commonwealth do not comport with those requirements, and that the EPA's limiting interpretation of the scope of the Act's judicial review provisions to conform to the minimum requisites of Article III of the Constitution was reasonable and appropriate. The Court of Appeals also rejected the Commonwealth's argument that the Act's judicial review provisions should, in effect, be read out of the Act or,

stated differently, that those provisions should be interpreted to permit a state to impose its own sharply restrictive opportunities for judicial review on administration of the federal program.

The Commonwealth sought and was denied rehearing en banc of the panel decision. It is significant that the Commonwealth did not seek rehearing of the panel decision on the issue of the judicial review provisions in seeking en banc rehearing.

In its Petition, under the guise of an asserted intrusion upon its state sovereignty, the Commonwealth demands the award of federal dollars to administer the Clean Air Act permit program despite its refusal to conform to Congressional mandates imposed as a prerequisite to federal program delegation. The first question presented by Petitioners asks this Court to impose the state's restrictive concept of judicial review upon a federal program delegation that is contrary to the minimum standards set by Congress.

The Commonwealth has imposed the most severe limitations upon judicial review of environmental agency decisions of any state. Under a long line of Virginia Supreme Court decisions interpreting the environmental and administrative laws of the Commonwealth, the state's highest court and its lower appellate courts have repeatedly concluded that Virginia law effectively bars judicial review of state agency air and water permit decisions to all but the permit

applicant.[2] Modification to the judicial review provisions of its Air Pollution statute in 1995 largely codified this existing precedent and essentially retained the restrictions on judicial review applicable to air permit decisions.[3]

Thus, under Virginia law, citizens are denied standing to seek judicial review of any air permit decision even though they may live or own property downwind or downstream of the permitted facility, even if they have riparian rights or live next door.[4] Under these limits on judicial review, the use of

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[2] Prior to 1995, the Commonwealth's air and water statutes flatly prohibited judicial review by anyone but the "owner", e.g., the permit applicant. Environmental Defense Fund v. Virginia State Water Control Board, 12 Va. App. 456, 404 S.E.2d 728 (1991); Town of Fries v. State Water Control Board, 13 Va. App. 213, 409 S.E.2d 634 (1991); Citizens for Clean Air v. Commonwealth of Virginia, 13 Va. App. 430, 412 S.E.2d 715 (1991).

[3] The modified statutes purport to allow standing to participants in the public process related to an agency's decision, but only if the party can demonstrate that (1) such person has suffered an actual, threatened or imminent injury; (ii) such injury is an invasion of an *immediate, legally protected, pecuniary and substantial interest* which is concrete and particularized; (iii) such injury is fairly traceable to the decision of the Board and not the result of the action of some third party not before the court; and (iv) such injury will likely be redressed by a favorable decision by the court." (Emphasis added). Va. Code §10.1-1318. The codification of the established requisites of "immediate" and "pecuniary and substantial" essentially continues the bar to anyone but the permit applicant from seeking judicial review. See, Harbor Cruises, Inc. v. State Corporation comm'n, 219 Va. 675, 250 S.E.2d 347 (1979)(immediate, pecuniary and substantial interest required).

[4] Environmental Defense Fund v. Virginia State Water Control Board,

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the environmental air resource is immaterial, as is the potential threat to health or welfare. For the same reasons -- lack of standing -- citizens also may not intervene in state enforcement actions for permit violations. Indeed, even the denial of a request for either an informal or formal administrative hearing is not appealable.[5] Finally, only promulgated regulations may be reviewed, while an agency's use of unpromulgated rules may be only appealed by a permit applicant.[6]

Intervenors in this action include five individual African American citizens. As members of a minority population, they are particularly affected by barriers against judicial review of agency decisions. A number of governmental and private studies have documented the disproportionate placement of heavily polluting facilities in areas which members of disadvantaged racial groups predominantly reside, even when compared to communities

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(...continued)
(downstream landowners, riparian users, fishermen); Town of Fries v. State Water Control Board, (adjacent permit holder, downstream municipal water supply intake); Citizens for Clean Air v. Commonwealth of Virginia, (downwind property owners). Cases cited supra, note 2. See Commonwealth v. Browner, 80 F.3d 869, 879 (4th Cir. 1996) (Commonwealth Petition, App. 21-22.)

[5] Environmental Defense Fund v. State Water Control Board, 12 Va. App. 456, 404 S.E.2d 728 (1991) (no review of denial of formal hearing request); Environmental Defense Fund v. State Water Control Board, Chan. No. HB-241-3 (City of Richmond, 1992) (no review of denial of informal hearing).

[6] Board of Medicine v. Virginia Physical Therapy Ass'n, 13 Va. App. 458, 413 S.E.2d 59 (1991), aff'd 245 Va. 125, 427 S.E.2d 183 (1993).

similar in all respects but race.[7] The reasons for such disproportionate placements are clear. First, the minority residents of these areas lack the voting power to undo by legislation Virginia's restrictions on their right to challenge the State's decisions issuing permits for polluting facilities in their areas. Second, the denial of access to the courts for all but the permit applicant or holder limits to those with political or economic influence the ability to affect state or agency decisions through extra-judicial efforts. Third, the exclusive availability of judicial review to the permit applicant skews the decision-making process to the extent that only decisions adverse to permit holder are subject to judicial review and correction.[8] The result is a system in which the lives, health,

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[7] This issue was first addressed in a study prepared by the U.S. Government Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (1983) ([b]lacks make up the majority of the population in three of the four communities where the landfills are located). That study was followed by a far larger study by the United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race in the United States* (1987) (although socio-economic status appears to play an important role in siting of hazardous waste facilities, race still proves to be a more significant factor). An EPA report concluded that racial minority and low-income populations experience higher than average exposure to air pollutants, hazardous waste facilities, contaminated fish, and agricultural pesticides, *Environmental Equity, Reducing Risk for all Communities*, EPA A230-R-92-008 (June 1992).

[8] "Without the possibility of judicial review by citizens, public participation before a State administrative agency could become a paper exercise. State officials will inevitably spend less time considering and responding to comments of parties who have no standing to sue, but will

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homes and property of minority citizens may be imperiled by the state agency actions without even the opportunity to question the legality and propriety of such actions before a court.

Increasingly, members of racial minorities perceive that environmentally risky and unwanted land uses involving pollution and toxic materials are disproportionately located next to them. Although this question is being debated throughout the nation, there is strong evidence that, in Virginia, it is reality. See, e.g., Residents Interested in Saving the Environment v. Kay, 768 F. Supp. 1144, 1149 (E.D. Va. 1991) aff'd, 768 F.2d 573 ("The placement of landfills in King and Queen County from 1969 to present has had a disproportionate impact on black residents."); Joint Legislative Audit and Review Commission of the Virginia General Assembly, Solid Waste Facility Management in Virginia: Impact on Minority Communities (1995) ("solid waste facilities in minority communities received fewer inspections and had especially long periods of non-compliance compared to those facilities in white communities").

States clearly have the ability to limit judicial review of matters solely within the province of a state, so long as those limits do not transgress Fourteenth Amendment

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[8] (...continued)
be more attentive to the comments of parties who can challenge the administrative decision in court." EPA, "Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act", Final Rule, 61 Fed. Reg. 20972 (1996) (Codified at 40 C.F.R. § 123.30).

guarantees. Here, however, Virginia seeks instead to impose its peculiarly restrictive limits on the availability of judicial review upon the administration of a federal program designed to control air pollution nationwide. Thus, this case does not raise concerns of state sovereignty. Rather, the case concerns only the authority of Congress to impose conditions upon delegation to a state of the administration of a federal program to protect the nation's air quality. Here, as with a host of other federal environmental programs, the state is not obligated to undertake program delegation. The Commonwealth may forego the incentives offered by Congress and do nothing, in which event EPA will operate the program in accord with Congressional instructions. Here, as a part of a national program, Congress simply required a consistent minimum standard of judicial review for permit decisions to be made under the Act and EPA has applied that requirement. Thus, it cannot fairly be argued that either Congress or EPA has exceeded the limits of federal power or intruded on state sovereignty.

REASONS FOR DENYING THE WRIT

The Commonwealth of Virginia Has Provided No Basis Recognized By This Court, To Warrant Review Of The Decision Of The Fourth Circuit With Respect To The Judicial Review Provisions Of The Clean Air Act.

The Commonwealth asserts in its Petition that review of the decision below is warranted because it presents an important federal question that should be decided by this Court, a conflict with relevant decisions of this Court, and a

conflict with decisions of other federal Courts of Appeals. However, the Commonwealth is unable to support any of those assertions. With respect to the Court of Appeals' determinations regarding judicial review provisions of the Act. To the contrary, as discussed within, Petitioner can formulate no alternate to the Court of Appeals' interpretation of those provisions that would merit review by this Court. Neither can Petition demonstrate any conflict between the Court of Appeals' decision and relevant decisions of this Court or other federal Courts of Appeals. Accordingly, the writ should be denied.

A. The Commonwealth Has Offered No Reasonable Alternative Interpretation Of The Judicial Review Requirements of §502(b)(6) Of The Clean Air Act That Merits Review By This Court

Section 502(b)(6) of the Clean Air Act, 42 U.S.C. § 7661a(b), provides that, in order to receive federal program delegation, a state program must provide the opportunity for judicial review to three categories of persons. Specifically, §502(b)(6) states that a state program must provide:

> Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of

> permit actions, including applications, renewals, or revisions, and including *an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law* (emphasis added).

EPA incorporated this statutory language verbatim into the Clean Air Act program requirements according to which it assessed Virginia's compliance. 40 C.F.R. § 70.4(b)(3)(x).

The language of the Act plainly requires expansive opportunities for judicial review of permit actions as a condition of program delegation to a state. The legislative history is equally clear that this section was intended to preserve and expand the availability of judicial review, not restrict it. These provisions were deemed essential to the fair treatment of all parties in the permit issuance process, as indicated by the Statement of the Senate Managers of the Act:

> Several other provisions [in section 502(b)(6)] are included to ensure fair treatment in the permit process. For example, we make clear that judicial review of final actions by the permitting authority to issue or deny permits shall be available in State court to anyone who could obtain such review under any applicable law. *This provision ensures that existing provisions of law governing the availability of review of final actions on permit applications*

are in no way limited, and that interested parties who arguably are affected by permit decisions are guaranteed their day in court.

Chafee-Baucus Statement of Senate Managers, S. 1630, The Clean Air Act Amendments of 1990, reprinted in 136 Cong. Rec. 516, 941 (daily ed. October 27, 1990) (emphasis added).

It is likewise clear that the public participation and judicial review requirements serve important roles in the functioning of delegated programs. They serve to ensure that the federal-state partnership inherent in delegated federal programs is implemented in a manner which not only incorporates federal and state resources, but the resources of citizens as well in fighting the common pollution enemy. The critical importance of active and meaningful citizen participation in successfully implementing environmental programs cannot be overemphasized, and are particularly relevant in delegated programs where federal oversight is necessarily relaxed.[9] Moreover, the opportunity for judicial

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[9] In describing the respective delegation roles of the federal-state partnership and citizens under the Clean Water Act permit program, analogous to the Clean Air Act permit program now before the Court, EPA stated: "EPA [has a] strong policy interest in deferring to State administration of authorized NPDES [permit] programs. EPA firmly believes that States should implement the NPDES program in lieu of the federal government. However, EPA just as firmly believes that the opportunity for citizen participation is a vital component of a State NPDES program. In authorizing State programs to act in lieu of the federal government, EPA must ensure that the implementation of the State program will be substantially adequate and procedurally fair. Because this

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review is an essential element even to effective public participation at the administrative level, as EPA recognized in promulgating parallel rules requiring the availability of state judicial review for delegated federal programs under the Clean Water Act, 33 U.S.C. § 1251:

> When citizens are denied the opportunity to challenge executive decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as through public comments and public hearings on proposed permits, may be seriously compromised. If citizens perceive that a state is not addressing their concerns about permits because the citizens have no recourse to an impartial judiciary, that perception also has a chilling effect on all the remaining forms of public participation in the permitting process.

Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 60 Fed. Reg. 14588, 14589 (March 17, 1995) (notice of proposed rule

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[9] (...continued)
rule will provide additional assurance of State program adequacy and fairness, it will allow EPA to exercise less oversight of State programs and allow more State autonomy in implementing NPDES [permit] programs." Id., 61 Fed. Reg. at 20974.

making[10]). (Cited by the lower court with approval in Commonwealth of Virginia v. Browner, 80 F.3d 869, 880 (4th Cir. 1996). (App. 21-22).

Given the express statutory language, clear intent of Congress, and important role of judicial review in the functioning of the delegated program, the only issue as to which an interpretation of the judicial review provisions is required, if at all, is with respect to the phrase affording judicial review to "any person who participated in the public comment process." The Court of Appeals, as well as both EPA and the Commonwealth, all agreed that this phrase requires a limiting interpretation. This is necessary because the phrase does not contain language which expressly limits its application to participants in the public comment process who meet the requisites of Article III standing or, as the Commonwealth argues, without such an interpretation limiting its reach to Article III requirements "the provision requires states to affort standing, regardless of injury to any person who participated in the public comment process". Pet. at 12.

It has long been recognized that although Congress has no power to alter the basic Article III standing requirements, it does have the power to waive prudential obstacles to standing:

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[10] The EPA amendments were finalized on June 7, 1996, and are codified at 40 C.F.R. § 123.30.

> Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.

Warth v. Seldin, 422 U.S. 490, 501 (1975) (citations omitted).

In enacting Section 502(b)(6), 42 U.S.C.§ 7661a(b)(6), Congress chose to exercise that right by expanding the rights to judicial review of air permits. The legislative history indicates that Congress felt strongly about the availability of judicial review, and clearly meant to remove every *prudential* barrier within their authority in order to encourage citizen participation. At the same time, Congress is under no requirement specifically to restate in every statute the requiremenst of Article III and every statute is to be interpreted, if at all possible, in a manner that conforms to the Constitution. New York v. United States, 505 U.S. 144, 170 (1992) (citations omitted). This canon of judicial construction ensures that every act of Congress shall be contained within its constitutional bounds.

Recognizing the plain language of the Act itself, combined with the long-standing ability of Congress to grant any right of action subject to the Constitutional requirements of Article III, EPA correctly interpreted the provisions of section 502(b)(6) to establish a "minimum floor" as limited by the requirements of Article III of the U.S. Constitution.

The Fourth Circuit upheld EPA's interpretation under the general rule established in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Commonwealth of Virginia, 80 F.3d at 878 (App. 17-18) at 878. Finding EPA's interpretation in harmony with the statute, and resolving the "slight tension" within section 502(b)(6), the Fourth Circuit ruled that EPA's interpretation was a "permissible construction of the statute" and entitled to deference. Id.

Intervenors assert that the language is plain on its face, and if any interpretation is required by EPA, it is negligible. Further, the interpretation given by EPA is so fundamental that it is no interpretation at all, but rather a reiteration of the basic constitutional holding of this Court in Warth v. Seldin, 422 U.S. at 501. Similarly, the "deference" granted to EPA by the lower court was minimal, and the statute's words and Congressional intent were easily discernible without any deference to EPA.

The Commonwealth's Petition fails even to identify a reasonable, alternative to this interpretation of §502(b)(6) that it suggests merits this Court's attention. Although this failure is disguised by the profuse assertions regarding state sovereignty, it warrants denial of the writ.

Although it poses no such interpretation to this Court, the Commonwealth suggested an interpretation in the court below, which the Court of Appeals carefully considered and properly rejected. Specifically, the Commonwealth suggested that that language of §502(b)(6) granting judicial review to those in the second category of §502(b)(6) "any person who participated in the public comment process" — should be limited by the language of the third category — "any other person who could obtain judicial review. . .under applicable law." Commonwealth v. Browner, 80 F.3d at 877 (App. 15). The Court of Appeals properly rejected that argument holding that "Virginia's proposed reading is contrary to ordinary principles of statutory construction and to the rules of English usage," Id. and one that would render the first to categories of persons granted review "mere surplusage." Id. (Citations omitted).

Thus, in contrast to the limiting interpretation of EPA held appropriate by the Court of Appeals, which the Court found "harmonizes" the several portions of the Act and conforms it to Article III requisites, the only interpretation the Commonwealth has offered is one that would render the section meaningless by eliminating any minimum floor for judicial review and supplanting it, instead, with whatever judicial review provisions any state wished to impose — however restrictive.

In short, in the face of express statutory language, clear expressions of congressional intent, the important purposes served in the functions of delegated programs each of which mandates expansive judicial review of permit decisions, and a reasonable, harmonizing interpretation

which, at the same time, recognizes the authority of Congress to remove prudential barriers to standing and the requisites of Article III, to the extent that the Commonwealth offers any alternative interpretation it is a tortured one that would require in the administration of a federal program application of each state's peculiar limits on judicial review, even to the extent of limiting that opportunity to the permit applicant alone. The Commonwealth has carefully avoided presenting such a proposed interpretation to this Court in its Petition, and such an interpretation does not merit consideration by this Court.

B. This Case Presents No Conflict Between The Established Law Of This Court That Would Merit Review

With respect to the first question presented, the Commonwealth relies exclusively upon a purported conflict between the decision below and this Court's decision in Gregory v. Ashcroft, 501 U.S. 452 (1991), as a basis for granting the writ. Pet. 10-16. No such conflict exists. The Court of Appeals carefully considered the language of Gregory as applied to this case. A brief review demonstrates that no conflict exists.

Gregory has no application until a federal program impinges on some aspect of state sovereignty. Gregory, 501 U.S. at 467 (federal law not applicable to state judges unless Congress has made it clear that state judges are included). In Gregory, the question was whether federal law imposed a direct, involuntary mandate on state judges. Here, the entire

applicability of the program, whatever, its interpretation, is voluntary. There is no impingement on state sovereignty in the Clean Air Act delegation provisions unless the state *elects to accept delegation*. While the Commonwealth criticizes the Fourth Circuit for stating that section 506(b)(6) unambiguously applies to state courts (Petition at 14), the Commonwealth ignores the voluntary nature of Clean Air Act program delegation. For the same reason, the "plain statement rule" applied in cases such as Gregory does not apply where Congress has provided a choice for states. As the Supreme Court stated in Gregory, the requirement that Congress clearly state its intent to preempt traditional state sovereign powers "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Gregory, 501 at 461. It is a rule of interpretation designed to avoid a constitutional conflict. Here, however, there is no such conflict.

Furthermore, for Gregory to even come into play in the interpretation of this statute, the statute must be, as a threshold matter, ambiguous as to whether Congress intended to impinge upon a core state function. As the Fourth Circuit Opinion correctly notes, there is no such ambiguity present in this statute. Commonwealth v. Browner, 80 F.3d at 879. (App 20). It is clear that the statute requires a delegated state program to show availability of state court judicial review for air emission permits. There is no ambiguity on that point and, thus, Gregory's admonition to avoid interpretations that raise constitutional questions is inapplicable.

No one doubts the principle that control of the state judiciary is a core state function. Such core functions, however, are not impacted by any federal law until that federal law directly impinges upon the state. It was clearly established by this Court in Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 269 (1981), that even though the federal law may have major impacts on state natural resource regulation or use, such impacts do not raise constitutional questions where Congress operates within its authority and offers the state the option to administer the program or leave its application to the federal government. Here, the Commonwealth is free to choose whether it wishes to accept delegation of the Clean Air Act permit program, and with it embrace the notions of fairness and citizen participation, including judicial review, that the Congress has chosen to impose on programs the states elect to operate. Whatever application Gregory v. Ashcroft may have to state sovereignty situations, it is not applicable here.

What the Commonwealth really fears is that its long-standing restrictions barring citizen access to the courts will be undercut where, should it fail to accept delegation, the issuance of air emission permits will be done by EPA, in a forum where citizen participation is welcomed, and the full protection of the courts is granted to those who are injured within the bounds of the U.S. Constitution. As a sovereign power, the Commonwealth is free to take offense at such notions, but it is not unconstitutional for the Congress to think otherwise.

Whatever the Commonwealth's motives may be, it's Petition before this Court presents no conflict with Gregory

or any other case. In fact, the Commonwealth would have this Court chart a new course for its long-standing application of the judicial review standard enunciated in Gregory, converting a rule of interpretation into a process that would bring every facial federal relationship with state government into a constitutional confrontation. The Petition fails to state any substantive grounds for the Court to so dramatically change its application of the interpretative rule in Gregory. Rather, the Commonwealth's Petition is an invitation for this Court to consider Virginia's own views about citizen standing. The proper forum for that political argument is the U.S. Congress, not this Court, and the Petition should be denied.

C. The Decision Of The Court Of Appeals Below Is Not In Conflict With Decisions Of Any Other Courts of Appeals

There is no conflict among the Courts of Appeals regarding the judicial review provisions of the Clean Air Act.

Petitioners indicate that each question presented satisfies this Court's several standards as to the grant of a writ of certiorari, including that the decision below conflicts with those of other federal courts of appeal. Pet. at 9. However, the Commonwealth does not cite or refer to a single decision of a court of appeal that in any way conflicts with the decision of the Fourth Circuit at issue on the issue of the judicial review provisions of the Clean Air Act. See Pet. 10-16.

In fact, there are no decisions of the Courts of Appeal that conflict with the decision below. This condition is undoubtedly traceable to the Commonwealth's uniquely extreme restrictions on those who have standing to seek judicial review of state agency decisions on air permits, discussed above. Nevertheless, the Commonwealth cannot establish a conflict among federal circuit courts on this issue that would warrant review of this Court.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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